IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 9 OF 2004

1. Miss Arland Rodrigues,
   daughter of Austin
   Rodrigues,

2. Shri Austin Rodrigues,
   son of Auspicio Rodrigues,

3. Smt. Alba Rodrigues,
   wife of Austin Rodrigues,

4. Kumari Ambela Rodrigues,
   daughter of Austin Rodrigues,

5. Kumari Alexandra Rodrigues,
   daughter of Austin Rodrigues,
   All residents of Quitla,
   Aldona. ... Applicants/
   Original Accused
   Nos.2 to 6.

versus

State ... Respondent/
Original Complainant

Mr. M. S. Usgaonkar, Senior Counsel with Mr. I. Aga, Advocate for the Applicants/Accused.

Ms. Winnie Coutinho, Additional Public Prosecutor for the State/Complainant.

CORAM : N. A. BRITTO, J.

DATE : 1ST JULY, 2004.

ORAL JUDGMENT

The Applicants herein are Accused Nos.2 to 6 in Criminal Case No.118/92/D who were tried by the learned Judicial Magistrate, First Class, Mapusa, under

Sections 143, 147, 447, 325, 323, 506 r/w 149 of the Indian Penal Code and who have now been convicted and sentenced under Section 323 of the Indian Penal Code by Judgment and Order dated 21st May, 2003, of the said learned Judicial Magistrate, First Class, Mapusa, and which conviction and sentence has been upheld by the learned Ist Additional Sessions Judge, Panaji, by Judgment and Order dated 6th November, 2003. The Applicants challenge the correctness and/or the legality of the said Judgments/Orders in the present revision.

2. The Applicants(A2 to A6) along with A1 were initially acquitted by the learned Judicial Magistrate, First Class, Mapusa, by Judgment dated 19th June, 2000. Thereafter,in Criminal Appeal No.11 of 2001, this Court by Judgment dated 20th February, 2003, set aside the said Judgment and Order of acquittal and directed the learned Judicial Magistrate, First Class, Mapusa to consider the evidence led by the prosecution, at length and in detail and then pass appropriate Judgment.

3. I am informed across the Bar that the Appeal filed by A1, Joanita Fernandes, in the said Criminal Case is still pending before the learned Ist Additional Sessions Judge, Panaji. I do not know how the parties or for that matter the learned Ist Additional Sessions

Judge, Panaji, did not take up the said Appeal filed by A1, Joanita Fernandes, along with the Appeals filed by the present Applicants/A2 to A6.

4. In the alleged incident there were three families involved namely those of the informant/PW1, Evita Fernandes, A1,Joanita and A3, Austin Rodrigues, whose wife is A4, Alba Rodrigues and whose daughters are A2, Arlene Rodrigues, A5, Annabela Rodrigues and A6, Alexandra/Alexia Rodrigues. After the alleged incident and admittedly, P.W.1, Evita Fernandes, went to Mapusa Police Station and from there to Asilo Hospital where she was examined at 10.35 a.m. by P.W.3, Dr. Dorin Noronha, who found on her amongst bruises and abrasions two haematomas one 2 x 2 inches on the right temporal region, and the other 2 x 1 inch on the centre of the scalp. On her return to Mapusa Police Station, her complaint was recorded at about 12.15 hours. A1, Joanita Fernandes, proceeded to Aldona Out-Post where she lodged her complaint which was treated as NC, at about 9.45 hours. The said complaint was lodged by the said A1, Joanita Fernandes, against P.W.1, Evita Fernandes, alleging that P.W.1, Evita Fernandes, had assaulted A1, Joanita Fernandes. Thereafter, A1, Joanita Fernandes, proceeded to Asilo Hospital where she was examined at about 0.20 p.m. and she was found probably by P.W.3, Dr. Dorin Noronha,

amongst other injuries a haematoma 2 cms. x 2 cms. on the left occipital region. Apparently, A1, Joanita Fernandes, did not pursue her complaint any further.

5. The complaint of P.W.1, Evita Fernandes, was investigated by Mapusa Police Station and a charge-sheet was filed. As can be seen from the concise statement mentioned on the charge-sheet, it was the case of the prosecution that on 7th January, 1992, at 8.30 hours, the said accused in furtherance of their common intention and in unlawful assembly trespassed into the house of the Complainant armed with wooden dandas and assaulted the said Complainant/P.W.1, Evita Fernandes and caused simple and grievous injuries to her and also gave filthy words such as "Ranghe", "Chedye" etc. and also threatened her with dire consequences.

6. Both the learned Courts below have accepted the case of the prosecution mainly relying upon the version given by the said P.W.1, Evita Fernandes, holding that her version was corroborated by P.W.3, Dr. Dorin Noronha, P.W.5, Reshma Jadhav, P.W.6, Mario Alemao and P.W.7, Vishnudas Govekar.

7. Mr. M. S. Usgaonkar, learned Senior Counsel on behalf of the Applicants/A2 to A6, has

submitted that there was delay in lodging the complaint or the F.I.R. by the said P.W.1, Evita Fernandes and the said complaint was lodged by her only to counterblast the complaint filed by A1, Joanita Fernandes. Mr. Usgaonkar, learned Senior Counsel has further submitted that this was a case where admittedly, injuries were also found on the person of A1, Joanita Fernandes, which injuries were not explained by the prosecution and, therefore, the case of the prosecution ought not to have been accepted. It is also the submission of Mr. Usgaonkar, learned Senior Counsel that the case of the prosecution having been disbelieved under most of the Sections of Indian Penal Code, benefit of doubt ought to have been given to the Accused under Section 323 of the Indian Penal Code. Mr. Usgaonkar, learned Senior Counsel has placed reliance on the case of **Cherlopalli Cheliminabi Saheb and another** v. **State of A.P.**(2003) 2 SCC 571.

8. On the other hand, Ms. Winnie Coutinho, learned Additional Public Prosecutor on behalf of the State has submitted that the said Accused have now approached this Court in revision against concurrent findings given by the learned two Courts below. Ms. Coutinho, learned Additional Public Prosecutor has submitted that this Court cannot treat itself as an appellate Court and re-appreciate the evidence which

has otherwise been appreciated in all its details, by both the Courts below and unless flagrant injustice has been caused to the Applicants there is no question of interfering with the concurrent findings given by both the Courts below.

9. There is no dispute that both the learned Courts below had given concurrent findings and have come to the conclusion that the case of the Complainant is corroborated by the said witnesses as well as the medical evidence led in support of the case.

10. In the case of **Krishnan and another** v. **Krishnaveni and another**(AIR 1997 SC 987) the Hon'ble Supreme Court referring to Sections 397 and 401 of the Code of Criminal Procedure, 1973 had stated that the power of the High Court of continuous supervisory jurisdiction is of paramount importance to examine the correctness, legality, or propriety of any finding, sentence or order, recorded or passed as also regularity of the proceedings of all inferior Criminal Courts. Referring to Section 482 of the said Code, the Hon'ble Supreme Court has further observed that the power is very wide but such power must be exercised sparingly and cautiously and when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or

order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process of miscarriage of justice or to correct irregularities/incorrectness committed by inferior Criminal Court in its juridical process or illegality of sentence or order(Emphasis supplied).

11. The Supreme Court again in the case of **State of Kerala** v. **Puttumana Illath Jathavedan Namboodiri**((1999) 2 SCC 452) observed that the revisional jurisdiction of this Court is supervisory jurisdiction for correcting miscarriage of justice but it cannot be equated with the power of an appellate Court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. It may be noted that the said observations were made by the Supreme Court in a case where the High Court had committed an error in not examining several items of evidence which were relied upon by the Additional Sessions Judge, while confirming the conviction(Emphasis supplied).

12. In my opinion, both the learned Courts below have overlooked essential parts of evidence and have based their conclusion upon extraneous matters. In other words, both the learned Courts below have failed to notice some basic and glaring features in the evidence of the witnesses and have superficially treated the same as corroborative evidence to the evidence of P.W.1, Evita Fernandes.

13. Both the learned Courts below were not at all conscious of the fact that there was an enemity, prior to the incident, and probably from the time P.W.1, Evita Fernandes, came to reside in the locality, between the said P.W.1, Evita Fernandes, on one hand and A1, Joanita Fernandes and A3, Austin Rodrigues and there have been complaints and cross complaints filed by them. Both the learned Courts below also failed to take note of the fact that P.W.5, Reshma Jadhav, was working as a maid servant of P.W.1, Evita Fernandes, at the relevant time and P.W.7, Vishnudas Govekar, was not only the tenant but was also a Peon working in the same Bank where P.W.1, Evita Fernandes was working. P.W.5, Reshma Jadhav and P.W.7, Vishnudas Govekar, could be termed as partisan witnesses but by no stretch of imagination they could have been said to be independent witnesses as contended by the learned Additional Public Prosecutor and being so, it was necessary for both the

Courts below to have examined their evidence little more closely which does not appear to have been done at all.

14. In the case of **Hari Obula Reddi and others** v. **The State of Andhra Pradesh**(1980 CRI.L.J. 1330) the Hon'ble Supreme Court has observed that in matters of appreciation of evidence, no hard and fast rule can be laid down in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative and the evidence of the witness appears to the Court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source. The Hon'ble Supreme Court further observed that since perfection in this imperfect world is seldom to be found, and the evidence of a witness, more so of an interested witness, is generally fringed with embellishment and

exaggerations, however true in the main, the Court may look for some assurance, the nature and extent of which will vary according to the circumstances of the particular case, from independent evidence, circumstantial or direct, before finding the accused guilty on the basis of his interested testimony. The Hon'ble Supreme Court noted that these were only broad guidelines which may often be useful in assessing interested testimony, and are not iron-cased rules uniformly applicable in all situations.

15. The broad version, given by P.W.1, Evita Fernandes, is that the incident took place at about 8.30 a.m. on 7th January, 1992 as she was returning after calling another servant. She stated that as she was going to call, A1, Joanita Fernandes, abused her with words such as "Chedye", "Bitch", "Ranghe" and as she was returning, A1, Joanita Fernandes, started abusing her and called the other Accused and she rushed back to her house but before he could reach the door, they caught hold of her and started kicking, slapping and giving blows and A1, Joanita Fernandes, hit her on her head with a wooden stick and A5, Annabela beat her on her private part and she sustained injuries/bruises on her head and she managed to escape from their clutches and went home and as she was thinking to go to the Police Station, they obstructed her from proceeding

from the front gate and threatened her that they would kill her in case she lodged a Police complaint and she told P.W.6, Mario Alemao, who was her neighbour and who was passing by that side, to take her to the Police Station on her two wheeler and they went. She stated that because of the assault on her private part she started bleeding and she fainted and the Police referred her to Asilo Hospital and she returned back to the Police Station with her report. She stated that P.W.5, Reshma Jadhav and P.W.7, Vishnudas Govekar, witnessed this incident.

16. I am not inclined to accept that there was delay in lodging F.I.R.in this case. Since P.W.1, Evita Fernandes, was bleeding per vagina, the Police were bound to send her first to be medically attended to and that would have taken some time and by the time she returned to the Police Station. However, there is much more in the case to be noticed than the submissions made on behalf of accused.

17. Both the learned Courts below have failed to take note of the fact that the assault with the stick by A1, Joanita Fernandes on P.W.1, Evita Fernandes, was not corroborated by either of the said witnesses namely P.W.5, Reshma Jadhav, P.W.6, Mario Alemao and P.W.7, Vishnudas Govekar. If, P.W.1, Evita Fernandes, spoke

of any stick blow being given by A1, Joanita Fernandes on her head, it can be seen from the Medical Certificate prepared by P.W.3, Dr. Dorin Noronha, that P.W.1, Evita Fernandes, had two haematomas, one on the right temporal region and the other on the centre of the scalp and there is no explanation given by P.W.1, Evita Fernandes, as to how the second haematoma came to be caused to her in case A1, Joanita Fernandes had given her only one hit with the said stick and the rest of the assault was restricted to kicks, slaps or fist blows. The prosecution also failed to elicit an opinion from P.W.3, Dr. Dorin Noronha, whether the said two haematomas could have been caused by a stick or whether they could have been caused by any other blunt surface or object. As against this, the defence had led evidence that A1, Joanita Fernandes, also had a haematoma on the left occipital region of her head and regarding which P.W.1, Evita Fernandes, nor the other three witnesses, who claimed to be eye witnesses, had given any explanation.

18. In this context, reliance was placed on behalf of the Applicants on the said case of **Cherlopalli Cheliminabi Saheb and another** v. **State of A.P.**(supra) wherein the Hon'ble Supreme Court observed as follows:-

> "In this case as stated above, the prosecution has

> come out with a particular narration of the incident in question according to which the Appellants and two others stabbed the deceased but the prosecution has recovered only one weapon. Therefore, it is difficult to appreciate the prosecution case how by one single weapon all these four accused persons could have stabbed the deceased. That apart, the prosecution in its version of the incident has not explained how the accused persons suffered injuries and by whom. There is an obligation on the part of the prosecution to explain the injuries suffered by the accused. In the instant case, the accused also came to the hospital almost at the same time as the deceased and the doctor examined them after examining the deceased, therefore, these injuries on the accused persons must have been caused in the same incident in which the deceased suffered injuries which later became fatal. Hence, in the absence of any explanation from the prosecution version of the incident becomes doubtful".

19. On behalf of the prosecution, reliance has been placed on the case of **Sucha Singh and another** v. **State of Punjab**(2003 AIR SCW 3984). In this case, the Hon'ble Supreme Court raised a question as to what would be the effect in case there was no explanation of injuries on the Accused and answered the same by stating that the Supreme Court was not prepared to agree that in each and every case where prosecution

fails to explain the injuries found on some of the Accused, the prosecution case should automatically be rejected without any further probe. The Hon'ble Supreme Court further observed that non-explanation of the injuries by the prosecution will not affect prosecution case where injuries sustained by the Accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries. The Hon'ble Supreme Court further observed that the prosecution is not called upon in all cases to explain the injuries received by the accused persons and it is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons and when that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an Accused and that the obligation of the prosecution to explain the injuries sustained by the Accused in the same occurrence may not arise in each and every case and it is not an invariable rule that the prosecution has to explain the injuries sustained by the Accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the Accused beyond reasonable doubt, question of

obligation of prosecution to explain injuries sustained by the Accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the Accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the Accused. It is more so when the injuries are simple or superficial in nature.

20. In this case, both A1, Joanita Fernandes and P.W.1, Evita Fernandes had more or less similar injuries, namely haematoma/s. No explanation has come from P.W.1, Evita Fernandes, as to how A1, Joanita Fernandes, received the said injury and no explanation has come from other witnesses as to how both of them sustained the said injuries.

21. There can be no two opinions that when injuries on the Accused are not explained by the prosecution witnesses an interference can be drawn that the prosecution has suppressed the genesis and the origin of the occurrence and has not presented the true version and the other witnesses who have not spoken to regarding such injuries are lying on material aspects of the case and their evidence is unreliable. Such is the case at hand.

22. The version of P.W.1, Evita Fernandes, as to where the incident took place is not supported either by the panchanama of the scene of offence in support of which P.W.4, Milagres Fernandes, was examined or for that matter by the evidence of the said three witnesses. The version of P.W.1, Evita Fernandes, that she fainted was not again supported by any of the two witnesses. The version of P.W.1, Evita Fernandes, that she was taken to Mapusa Police Station by P.W.6, Mario Alemao, was again not supported by him. It is to be noted that after P.W.1, Evita Fernandes and A1, Joanita Fernandes complained of assault against one another, both of them were arrested at about 1.00 p.m. and thereafter possibly proceeded under Chapter proceedings. That can be seen from the documents produced by P.W.8, P.S.I. Anant Naik.

23. However, the matter of appreciation of evidence of P.W.1, Evita Fernandes and other witnesses does not end there. P.W.5, Reshma Jadhav, was a maid servant of P.W.1, Evita Fernandes. According to her, she was in the house of P.W.1, Evita Fernandes and the statement made by her is that "she heard the shout of saying Reshma come somebody is assaulting her". One does not know who had uttered the said words calling P.W.5, Reshma Jadhav, to the scene. P.W.5, Reshma Jadhav, further stated that after she came out in the

balcony she saw six persons, among them three were ladies. It is to be noted at this stage that both the learned Courts below have failed to take note of the said statement of P.W.5, Reshma Jadhav, that what she saw when she came out in the veranda were three ladies and three men when in fact there has been only one man amongst the Accused. She further stated that A3, Austin Rodrigues, was assaulting P.W.1, Evita Fernandes, and A1, Joanita Fernandes, was carrying a danda in her hand and she saw some of the Accused catching hold of P.W.1, Evita Fernandes, but she could not give the names of the Accused who were catching P.W.1, Evita Fernandes. She stated that she would be in a position to identify the Accused. However, the fact remains that on the date the evidence of P.W.5, Reshma Jadhav was recorded before the Trial Magistrate some of the Accused were absent. The learned Judicial Magistrate, First Class, Mapusa, had referred to the case of **State of Haryana** v. **Tek Singh**((1999) 4 SCC 682 to justify the conclusion that the witnesses were not required to give details regarding minor discrepancies and trivial matters not touching the core of the case. However, the learned Judicial Magistrate, First Class, Mapusa, had failed to take note that the core of the case was essentially a simple assault between two women namely A1, Joanita Fernandes and P.W.1, Evita Fernandes and when it was a simple assault some simple details

from the witnesses ought to be forthcoming. Reverting to the evidence of P.W.5, Reshma Jadhav, she stated that the Accused were assaulting P.W.1, Evita Fernandes, with kicks, slaps and fist blows and P.W.1, Evita Fernandes, had fallen on the ground. Here, it may be observed that it was not the case of P.W.1, Evita Fernandes, that she had at any time fallen on the ground. Although, intitially P.W.1, Evita Fernandes, stated that A5, Annabela Rodrigues, had kicked her, later, she stated that she did not remember whether she had kicked her on her private part. If according to P.W.1, Evita Fernandes, the alleged incident took place just before she could enter the door of her house and probably near the steps leading to the said house, according to P.W.5, Reshma Jadhav, the incident took place near the pathway, when she was in the kitchen at the relevant time. It is to be noted that P.W.5, Reshma Jadhav, stated that she saw six persons, three being men and three ladies. P.W.5, Reshma Jadhav had failed to identify such persons either by their names and likewise had failed to identify them either in the course of investigations or before the Trial Court by their faces and, therefore, by no stretch of imagination it could be said that P.W.5, Reshma Jadhav, had corroborated the evidence of P.W.1, Evita Fernandes. The question was not whether P.W.5, Reshma Jadhav had given correctly the description of the house

of P.W.1, Evita Fernandes, where she was serving as stated by the Trial Court, but the question was whether if she was in the house and had seen the incident of assault at all. The very fact that P.W.5, Reshma Jadhav, did not refer to any assault by A1, Joanita Fernandes, by stick and otherwise stated that the assault had taken place near the pathway were reasons good enough to discard her evidence; that she had seen three men and three women among the assailants was another good reason to discard her evidence as unreliable.

24. The evidence of P.W.6, Mario Alemao, was also not free from discrepancies and inconsistencies. He makes no reference to A2, Arlene Rodrigues, at all. According to him, A1, Joanita Fernandes, was abusing P.W.1, Evita Fernandes, in bad language. A1, Joanita Fernandes, called A3, Austin Rodrigues and thereafter A4, Alba Rodrigues, A5, Annabela Rodrigues, and A6, Alexandra Rodrigues came to the house of P.W.1, Evita Fernandes and proceeded to catch hold of P.W.1, Evita Fernandes and started assaulting her with fist blows. According to him, it is A3, Austin Rodrigues(and not A1, Joanita Fernandes) who was carrying a danda. He stated that rest of the Accused were giving fist blows and thereafter they went away. As already stated, P.W.6, Mario Alemao, does not at all speak of any

assault by A1, Joanita Fernandes, on the head of P.W.1, Evita Fernandes or for that matter does not speak anything about the participation of A2, Arlene Rodrigues in the said assault. In fact, P.W.6, Mario Alemao, clearly admitted in his cross-examination that he did not know who did what and that he had not witnessed the incident in the paine(lane) and that he did not wait to see as to what was going on at the place of incident. It is, therefore, obvious that P.W.6, Mario Alemao, was not prepared to support and had not at all supported the version of the said P.W.1, Evita Fernandes.

25. P.W.7, Vishnudas Govekar, stated that he heard a noise near the well being made by some ladies and he peeped through the window and he saw the accused persons assaulting P.W.1, Evita Fernandes with slaps. Again, according to him, it is A3, Austin Rodrigues who was carrying some weapon in his hand. He stated that he did not know on what part of the body of P.W.1, Evita Fernandes, the assault was going on. Here again, it may be observed that P.W.7, Vishnudas Govekar, has stated that the incident did not take place on the footway, unlike P.W.5, Reshma Jadhav. In the cross-examination, he conceded that he would not be in a position to say as to who assaulted P.W.1, Evita Fernandes, on the head and on which part of the body

the slaps were given although he had made enquiries thereafter. From the facts stated by P.W.7, Vishnudas Govekar, it cannot be said that he had corroborated any version given by P.W.1, Evita Fernandes. In fact, P.W.7, Vishnudas Govekar, made no mention of any kicks or for that matter blows have been given by any of the Accused and regarding the slaps he was not able to give barest, or no details whatsoever when the very core of the prosecution case was a simple assault with slaps or fist blows.

26. As observed herein above, both the learned Courts have appreciated the prosecution evidence very superficially and not meticulously. They were required to make a closer scrutiny of the evidence particularly of P.W.5, Reshma Jadhav and P.W.7, Vishnudas Govekar considering their relationship to P.W.1, Evita Fernandes. By no stretch of imagination, and for reasons stated herein above, it could be said that the version given by P.W.1, Evita Fernandes, was sufficiently corroborated in material particulars by the evidence of P.W.5, Reshma Jadhav or P.W.7, Vishnudas Govekar. As already stated, P.W.6, Mario Alemao, was not at all inclined to support the case of P.W.1, Evita Fernandes.

27. In my opinion, the conviction and sentence

imposed by the learned Courts below has certainly resulted in miscarriage of justice and intervention of this Court is called for to correct the same. In my opinion, on the evidence led by the prosecution no conviction could have been recorded by the learned Courts below. In fact, the appreciation of the prosecution evidence has been rather perverse. The conviction and sentence recorded by the learned Judicial Magistrate, First Class, Mapusa and upheld by the learned Ist Additional Sessions Judge, Panaji, therefore, deserves to be set aside. As a result, the Revision Application deserves to succeed and the Applicants/Accused now deserve to be acquitted under Section 323 r/w 34 of the Indian Penal Code which I hereby do.

N. A. BRITTO, J.

RD.